(5)

No. 89-390

In the Supreme Court of the United States

OCTOBER TERM, 1989

PENSION BENEFIT GUARANTY CORPORATION,
PETITIONER

v.

LTV CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 4047 of the Employee Retirement Income Security Act of 1947 (ERISA), 29 U.S.C. 1347 (1982 & Supp. V 1987), authorizes the Pension Benefit Guaranty Corporation (PBGC) to "restore" a terminated pension plan to its pre-termination status, thus transferring the assets and liabilities of the plan back to the sponsoring employer, "in any such case in which the corporation determines such action to be appropriate and consistent with its duties." In this case, the PBGC restored pension plans sponsored by LTV Steel Company in part because LTV Steel, subsequent to the termination, adopted "follow-on" plans to provide benefits not covered by the termination insurance program. The PBGC determined that LTV Steel had abused the termination insurance program by shifting its liabilities to the PBGC while, in effect, continuing to operate the plans. The Second Circuit, which concluded that the PBGC had "focused inordinately on ERISA" (Pet. App. 17a) and had failed to take into account policies underlying bankruptcy and other labor laws, held, inter alia, that the PBGC erred in basing its restoration decision on LTV Steel's adoption of follow-on plans.

The United States will address the following question:

May the PBGC, in deciding whether to restore a terminated plan, take into consideration the sponsoring employer's adoption of an abusive follow-on plan?

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INTEREST OF THE UNITED STATES

This case involves the termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly owned government corporation that has independent litigating authority (29 U.S.C. 1302(b)(1)), is primarily responsible for operating the termination insurance program. But the Department of Labor and the Treasury Department also have substantial interests in the operation of the program. Under 29 U.S.C. 1104(a)(1)(D) and 1132(a)(2), the Secretary of Labor may bring suit to enforce the terms of employee benefit plans. See

also 29 U.S.C. 1132(a)(5). Under 29 U.S.C. 1132(b), the Secretary of the Treasury and the Secretary of Labor have joint responsibility with respect to delinquent contribution actions against employers that have not fulfilled the minimum funding requirements established by ERISA. And under 26 U.S.C. 4971, the Secretary of the Treasury is responsible for imposing excise taxes on employers that do not fund their pension plans in accordance with ERISA's requirements.

Moreover, the court of appeals in this case held that the broad grant of authority to the PBGC in Section 4047 of ERISA—to restore a terminated pension plan to its pre-termination status and thus to transfer the assets and liabilities of the plan back to the sponsoring employer—is limited by the examples provided in the legislative history relating to the provision. Specifically, the court concluded that because the congressional reports identified improvements in financial condition as a ground for restoration, the PBGC erred in basing its restoration decision on other reasons. Pet. App. 17a-18a. All federal agencies have a strong interest in correcting this erroneous approach to statutory construction—an approach that would significantly reduce agencies' powers under statutory grants of authority.

In addition, the court of appeals held that, since the plan sponsor was seeking to reorganize, the PBGC should have tempered its efforts to protect the termination insurance fund in light of the policies underlying the Bankruptcy Code. That holding is of particular concern to the Federal Deposit Insurance Corporation, which frequently seeks to collect the assets of failed banks for the benefit of the federal deposit insurance fund.

STATEMENT

1. This case arises from the termination and subsequent restoration of three underfunded pension plans maintained by respondent LTV Steel Company. Defined benefit pension plans—the type involved here—are insured by petitioner, the Pension Benefit Guaranty Corporation (PBGC), a wholly-owned government corporation established by Title IV of ERISA. See 29 U.S.C. 1302.[1] Although Title I of ERISA requires employers to make regular contributions to defined benefit plans, a plan may become underfunded even if the employer is fulfilling its minimum funding obligations. For example, if pension benefits are increased as a result of collective bargaining, it might take some time for the plan's trust fund to provide for the increase in obligations. Plans may also become underfunded when an employer obtains a waiver from the Internal Revenue Service allowing it to amortize payments over a period of years rather than pay them immediately. See 26 U.S.C. 412(d). And, of course, plans may become underfunded when the amounts paid as benefits exceed the actuarial predictions, as can happen when financial difficulties cause the layoff of large numbers of employees who are eligible for pension benefits.

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[1] Under defined benefit plans, retirees receive a fixed amount per month based on factors such as final salary and years of service. Such plans differ from defined contribution plans, under which employers typically contribute a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. See 29 U.S.C. 1002(34) and (35). Insurance is not needed for defined contribution plans, since employees simply receive the money in their individual accounts. Insurance is needed for defined benefit plans, however, to ensure that funds are available to pay promised pensions.

See PBGC, *Promises at Risk* 26-27 (1987), *reprinted in PBGC Proposal to Initiate a Variable Rate Premium System: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 34-35 (1987); Congressional Budget Office, *Federal Insurance of Private Pension Benefits* 12-15 (Oct. 1987),

Under ERISA's "standard termination" procedure (29 U.S.C. 1341(b) (1982 & Supp. V 1987)), an employer may terminate a plan if the plan has sufficient assets to cover its liabilities.[2] If, as here, a plan is underfunded, an employer may seek a "distress termination" (29 U.S.C. 1341(c) (1982 & Supp. V 1987)), normally from a bankruptcy court. Such a "voluntary" distress termination is allowed if "the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, [the employer] will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process." 29 U.S.C. 1341(c)(2)(B)(ii)(IV). Thus, a reorganizing company may terminate an underfunded plan only when the alternative is liquidation.

An underfunded plan may also be terminated by the PBGC. Under 29 U.S.C. 1342(a) (1982 & Supp. V 1987), the PBGC may terminate a plan if, for example, it determines that the plan is seriously underfunded or that the possible long-run risk to the PBGC "may reasonably be expected to increase unreasonably if the plan is not terminated." If the PBGC's decision to terminate is contested, district court approval is required. 29 U.S.C. 1342(c).

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[2] Special rules apply to multi-employer pension plans. See 29 U.S.C. 1381 *et seq.* The plans at issue here are single-employer plans.

As a result of a termination, the PBGC becomes responsible for some, but not all, of the benefits due under the plan. The PBGC may not pay any beneficiary benefits of more than $750 per month in 1974 dollars—about $2,000 today (see *Promises at Risk, supra*, at 17)—even if an employee is entitled to greater benefits under the terms of a plan. 29 U.S.C. 1322(b)(3)(B). In addition, benefit increases resulting from plan amendments adopted within five years of the termination are not paid in full, and employees do not continue to accrue benefits under a plan once it is terminated. *Promises at Risk, supra*, at 17. These limitations operate as a form of coinsurance, aligning the interests of employees with the PBGC and against termination. R. Ippolito, *The Economics of Pension Insurance* 21-22 (1989). The employer is not relieved of liability once it terminates a plan, since the PBGC may seek to recover from the employer (including members of its "controlled group" (see 29 U.S.C. 1301(a)(14)) pursuant to 29 U.S.C. 1362. However, the PBGC normally must stand in line with other creditors in a reorganization proceeding, and it has in the past averaged recovery of only eight cents on the dollar. *Promises at Risk, supra*, at 28.

Plans that have been terminated may be "restored" pursuant to Section 4047 of ERISA, 29 U.S.C. 1347 (1982 & Supp. V 1987). Section 4047 provides that, "[i]n the case of a plan which has been terminated under section 1341 or 1342 of this title the corporation is authorized in any such case in which the corporation determines such action to be appropriate and consistent with its duties under this subchapter, to take such action as may be necessary to restore the plan to its pretermination status." The provision fur-

ther states that the PBGC may "transfer to the employer * * * all of the remaining assets and liabilities of the plan." Thus, as a result of the restoration of a plan, the employer, rather than the PBGC, becomes responsible for the payment of benefits, and employees are entitled to all benefits due under the plan, not just the benefits insured by the PBGC.[3]

The PBGC has consistently made clear that it will restore a terminated plan if the employer creates an abusive "follow-on" plan. In three opinion letters, it reiterated that "the termination insurance program of Title IV was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. Accordingly, if an employer adopts a new plan that, "together with the guaranteed benefits paid by the PBGC under the terminated plan, provide for the payment of, accrual of, or eligibility for benefits that are substantially the same as those provided under the terminated plan" (R. 194), the PBGC views the plan as an attempt to shift liability to the termination insurance program while continuing to operate the plan.[4] In the PBGC's view, the

[3] Judicial approval is not required for a restoration decision to take effect, even though approval is usually necessary before an underfunded plan is terminated. The probable reason for the difference, as the district court noted, is that participants "may immediately experience cutbacks in their benefit payments" as the result of a termination, whereas "either no change or an increase in benefit payments" follows from restoration. Pet. App. 89a.

[4] Whether a new plan, together with the PBGC's payments, provides "substantially the same" benefits must be decided on a case-by-case basis. Some cases are easy, however: in one of the cases in which the PBGC opined that a new plan was impermissible, the new plan expressly stated that it would provide 95 percent of the difference between the benefits promised under the terminated plan and the benefits paid by the PBGC. Pet. App. 176a. More generally, the PBGC "views a set of arrangements as substantially the same if it grants credit for purposes of benefit accrual, or for eligibility for certain types of benefits, for service rendered under the terminated plan or if it provides for the restoration or reimbursement of benefits which would have been paid under the terminated plan but which are not paid by the PBGC because of the limitations set forth in Title IV of ERISA." R. 194-195. Thus, a new plan is considered to be an abusive follow-on plan if it is tailored to make up for the benefits lost as a result of termination. The PBGC would not consider it abusive if, for example, an employer created new defined contribution plans that did not differentiate among participants based upon their past service.

termination insurance program should provide benefits only when plans have really been terminated.

2. The LTV Corporation filed a reorganization petition in 1986. At that time, one of its subsidiaries, LTV Steel, operated three defined benefit pension plans that were underfunded by approximately $2.3 billion, including some $2.1 billion in insured benefits. R. 8. LTV "readily concedes that one of the principal goals of the filing of LTV's and LTV Steel's Chapter 11 petitions was the restructuring of LTV Steel's pension obligations." Pet. App. 101a. LTV Steel could not terminate the plans under Section 1341, however, because its collective bargaining agreement prohibited termination. 29 U.S.C. 1341(a)(3). But LTV convinced the PBGC to terminate the plans pursuant to Section 1342 by informing the PBGC that it did not intend to make any further contributions to the already underfunded plans. Pet. App. 41a. Since LTV Steel was not contributing to the plans, and since employees would continue to accrue benefits until the plans were terminated, delaying termination would have substantially increased the PBGC's

potential liability. Moreover, LTV Steel had forecast that it might shut down some of its plants, and its collective bargaining agreement called for generous "shutdown benefits."[5] The PBGC would not be liable for the additional benefits if a shutdown occurred after termination of the plans, since it only pays benefits that have vested on the date of termination. The PBGC sought approval from the district court to terminate the plans and, with LTV's consent, the court approved the termination, making the PBGC the trustee of the plans. *Id.* at 42a.

The United Steelworkers of America (the Union), which had previously struck Wheeling-Pittsburgh Steel when it terminated its pension plans, threatened to strike unless its members received all the benefits due under the plans rather than the reduced benefits that would be paid by the PBGC. Pet. App. 43a. In June 1987, LTV Steel and the Union signed an agreement "which replaced most of the lost (i.e., non-guaranteed) benefits to retirees and created new benefit programs for active workers." *Id.* at 44a. The program, including a similar program for salaried employees, would cost LTV Steel about $90 million annually. *Id.* at 47a.

The PBGC had previously advised LTV and the Union that it viewed the agreement as an abusive follow-on plan, and the PBGC's Executive Director testified to that effect in the bankruptcy court, but the bankruptcy court approved the agreement over the PBGC's objection in July 1987. Pet. App. 45a. The court noted that its action did not "preclude[] the PBGC from pursuing [other] options." R. 623. After meeting with LTV officials and offering to consider any information LTV wanted to provide, the PBGC concluded that LTV Steel's new plans were abusive. In reaching that conclusion, the PBGC noted, among other things, that "[o]ne component of the Follow-On Agreements, the Individual Account Trust ('IAT'), would, by its express terms, replace a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination. The IAT would provide up to 100 per cent of the difference and no less tha[n] 90 per cent of the amount not provided by PBGC". R. 224. The PBGC also concluded that LTV Steel could afford to fund the terminated plans if they were restored.[6] In September 1987, the PBGC restored the three plans pursuant to Section 4047. Pet. App. 49a-50a.

3. LTV challenged the restoration decision, and the PBGC brought a federal court action to compel LTV Steel to comply with the decision. Pet. App. 51a-52a. The district court held the restoration decision unlawful. Although Section 4047 "contains little in the way of restrictive language" (Pet. App. 85a), the court held that the PBGC erred in considering the follow-on plans because "[t]he legislative history accompanying the enactment of section 4047 reveals that Congress expressly identified only improvements in the financial condition of the plan and its sponsor as possible grounds for restoration" (*id.* at 93a-94a). The court also noted that the PBGC in 1987 had supported a bill that would have precluded employers

[5] LTV Steel had promised its employees that, in the event of a shutdown, they would immediately become eligible for pension benefits with no reduction to reflect that the benefits commenced prior to normal retirement age.

[6] The PBGC had concluded that restoration would increase LTV Steel's costs by about $120 million annually, and that LTV Steel, which had a cash flow of $265 million in 1988, could handle that increase. Pet. App. 114a.

from establishing follow-on plans, but Congress, in amending the Act, did not enact that provision. *Id.* at 97a-99a.

The court then noted a further statement in the legislative history of Section 4047 that restoration is appropriate " 'if some other factor made termination no longer advisible.' " Pet. App. 100a (quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974)). However, the court held, "the Record does not support a finding that the PBGC's determination that the 1987 CBA Plans were abusive 'represents a reasonable accommodation of conflicting policies' within Title IV and between Title IV and other non-ERISA laws." Pet. App. 100a. In its view, the three opinion letters the PBGC had issued relating to other follow-on plans were irrelevant because the terminations at issue were "voluntary," whereas the termination here was "involuntary." *Id.* at 100a-101a. It also noted that, under 11 U.S.C. 1113, LTV Steel was required to bargain with the Union about modifications of their collective bargaining agreement even though it was seeking to reorganize. Pet. App. 102a-104a. Although, as the court conceded, "[i]t is not disputed that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and the new plans "substantially achieved that goal," the record, in the court's view, did not contain "any analysis by the PBGC of the differences, as opposed to the similarities, between the old and new plans." *Id.* at 109a.

Turning to the PBGC's contention that, in light of LTV Steel's improved financial condition, it could afford to fund the plans, the district court first stated

that the record "belies the PBGC's contention that an alleged improvement in LTV Steel's financial [condition] was an important factor in the restoration." Pet. App. 110a n.36. It also questioned the PBGC's conclusion that LTV Steel could fund the plans, and held that the administrative record did not support that conclusion. *Id.* at 118a.

The district court also held that the PBGC's restoration procedures were inadequate. Although the court agreed with the PBGC that it had "acted within its authority in attempting to evolve standards for restoration during an ongoing restoration proceeding" (Pet. App. 124a), the court concluded that the PBGC had failed "to set forth those standards with sufficient clarity to permit LTV to challenge them" (*id.* at 125a).

4. The court of appeals affirmed the district court's opinion in all relevant respects. Pet. App. 1a-27a. It introduced its discussion of the merits by stating that "[a]lthough this case arose under ERISA, the competing policies of bankruptcy and labor law must also be accorded due weight" (*id.* at 16a), and by noting its conclusion that "a review of the administrative record fails to satisfy us that PBGC adequately considered the policies and goals of the bodies of law involved in this case and their interaction with each other" (*id.* at 17a). "Rather," the court said, "PBGC focused inordinately on ERISA." *Ibid.* With respect to the PBGC's conclusion that "the adoption of the 1987 CBA Plans * * * constituted an abuse of the termination insurance program," the court determined that the PBGC could not take this factor into account because "[t]he legislative history of section 4047 reveals no indication that Congress intended the establishment of successive benefit plans to be a ground for restoration."

Ibid. Like the district court, it noted that Congress in 1987 failed to enact a proposal to outlaw follow-on plans, and stated that its failure to do so "reflects the continuing consensus not to include the establishment of follow-ons as a basis for restoration." *Id.* at 18a.[7]

Like the district court, the court of appeals found "problematic" the PBGC's conclusion that, " '[b]ased on LTV's own cash flow projections, it appears that the debtor will generate more than enough cash during the immediate future (1987 and 1988) to support the reinstatement of the pension obligation.' " Pet. App. 22a. It also agreed with the district court that the PBGC had followed inadequate procedures in restoring LTV Steel's plans. *Id.* at 26a.

DISCUSSION

The court of appeals erred in holding that the PBGC, in deciding whether to restore a terminated plan, may not take into consideration the sponsoring employer's adoption of an abusive follow-on plan. Section 4047 authorizes the PBGC to restore plans when it determines restoration to be appropriate, and the PBGC has reasonably concluded that restoration is an appropriate response to the adoption of abusive follow-on plans. The court of appeals' holding, which rests on an improper use of legislative history, threatens to undermine the termination insurance program, a program already seriously in debt. If

[7] The court of appeals continued: "Not only is there no indication that the establishment of follow-ons is impermissible, but PBGC offers no detailed comparison of the two sets of plans to support its conclusion that the 1987 CBA Plans were merely continuations of the old Plans." Pet. App. 19a.

LTV Steel's plans are not restored, the PBGC will be responsible for more than $2 billion in unfunded liabilities, and will be unable to recover at least a quarter of that amount from LTV. Moreover, other companies with underfunded plans are attempting to take advantage of the decision below. Accordingly, review by this Court is warranted.

1. As the PBGC has repeatedly stated, the termination insurance program "was not intended to subsidize an employer's ongoing retirement program." Pet. App. 162a, 167a, 173a. To the contrary, Congress has provided that an employer generally may terminate an underfunded pension plan and shift its liabilities to the insurance fund only if the alternative is liquidation. See 29 U.S.C. 1341(c)(2)(B)(ii) (1982 & Supp. V 1987). Moreover, since employees lose some benefits upon termination under the scheme Congress has devised, their unions will help to ensure that termination occurs only as a matter of last resort. That carefully constructed scheme falls apart if employers can shift their liabilities to the insurance fund while adopting new plans that grant the benefits not provided by the PBGC.[8]

Section 4047 is a broad grant of authority to the PBGC. It provides that restoration is warranted in

[8] Although the courts below failed to appreciate the force of the PBGC's position, a New York Times editorial asked: "Should ailing businesses be allowed to dump their current pension liabilities on the government—and then offer supplemental pension benefits to workers in return for cost-cutting concessions? That, incredibly, is what the bankrupt LTV Corporation hopes to do." *A Bad Loophole in the Pension Law* (Aug. 22, 1987). The Washington Post (*Steel Scam* (May 25, 1987)) and the Wall Street Journal (*Keeping Pension Promises* (May 26, 1987)) also editorialized in support of the PBGC's position.

any case "in which the corporation determines such action to be appropriate and consistent with its duties" under ERISA. The PBGC has reasonably determined that restoration is warranted to prevent abusive follow-on plans from being adopted. If an employer cannot provide the benefits it has promised, it ought not be allowed to make good only on the difference between the benefits provided by the PBGC and the benefits promised, while the termination insurance program pays the rest. Otherwise, employers in serious financial difficulty will choose to terminate their underfunded plans, and their unions will not object.[9] The only loser will be the insurance system, which would surely falter.[10]

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[9] Even if, as here, collective bargaining agreements prohibit termination, unions will not object to termination if their members do not suffer as a result. And if an employer cannot satisfy a bankruptcy court that it is in such distress that termination is appropriate under Section 1341, it might nevertheless be able to convince the PBGC to terminate a plan under Section 1342 by refusing to meet its funding obligations, as LTV Steel did. In light of LTV Steel's actions, it seems unrealistic to say, as the district court did in distinguishing the PBGC's opinion letters (Pet. App. 100a-101a), that the termination here was "involuntary."

[10] The PBGC would be able to avoid collapse only if the fee employers are charged to participate in the insurance program—which has increased from $1 per participant in 1974 to a variable rate of $16 to $50 per participant today (see Pet. 4 n.4)—is further increased. However, at some point the fee will be so high that employers with well-funded plans will choose to terminate them and substitute defined contribution plans in their place. (One company, ACO, Inc., reported that the most recent increase led it to terminate its plan because it did not think it ought "to subsidize the poor funding practices of other companies." Chernoff, *Crushed by the Weight*, Pensions & Investment Age 1, 55

Under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." The PBGC's construction of Section 4047 is plainly entitled to deference under that standard. Moreover, the case for deference is even stronger here than in *Chevron* since Section 4047 expressly and unambiguously grants the PBGC authority to restore pension plans "in any such case in which [it] determines such action to be appropriate and consistent with its duties." Thus, this case is more like *United States* v. *Morton*, 467 U.S. 822, 834, 835-836 (1984), where an agency was "explicitly delegated authority to construe the statute by regulation," and the Court held that its interpretation must be upheld unless it is " 'clearly inconsistent' with the statute or 'arbitrary.' " Indeed, the delegation here is broader than in *Morton*, since the PBGC has not just been given authority to interpret a statutory provision setting forth the circumstances in which restoration is appropriate, it has been given the very authority to make that determination.

The courts below held that the PBGC may not consider the creation of abusive follow-on plans in making restoration decisions primarily because the legislative history of Section 4047 mentions financial recovery but not follow-on plans. Pet. App. 17a, 93a-94a. But the language of a statute—particularly language expressly granting an agency broad

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(Sept. 4, 1989).) If such terminations become common, as a result of adverse selection only ailing corporations anxious to shift their unfunded liabilities to the PBGC will want to sponsor defined benefit pension plans.

authority—is not modified by examples in the legislative history. It is certainly not modified by legislative history that does not purport to be confining, and the relevant legislative history here notes that, in addition to financial recovery, restoration would be appropriate "if some other factor made termination no longer advisable." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 378 (1974).[11]

The courts below also erred in concluding that the PBGC improperly failed to take into account statutes other than ERISA, namely the Bankruptcy Code and the National Labor Relations Act (NLRA). This is not a case where any particular provision of those statutes conflicts with the PBGC's actions. In these circumstances, Section 4047 is the controlling provision. Indeed, in enacting that law, Congress was plainly aware that employers attempting to terminate plans would often be in bankruptcy proceedings and that members of labor unions would sometimes be affected by termination decisions. It nevertheless gave the PBGC broad authority to determine when restoration is warranted, and did not direct it

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[11] Contrary to the courts below (Pet. App. 18a, 97a-99a), their holding cannot be justified by Congress's actions in 1987, when it considered, but did not enact, a provision that would have expressly authorized the PBGC to prohibit follow-on plans. As this Court has stated, it is difficult to draw any conclusion from congressional inaction. See, *e.g.*, *United States* v. *Wise*, 370 U.S. 405, 411 (1962). Moreover, at the time the statute was amended, Congress was aware that the PBGC had just restored LTV Steel's plans (H.R. Rep. No. 391, 100th Cong., 1st Sess. Pt. 1, at 106-107, 178 (1987)), but Congress took no steps to revise Section 4047 to restrict the PBGC's authority. Thus, the conclusion that Congress approved of the PBGC's policy is at least as plausible as any other. Cf. *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

to consider anything other than its duties under ERISA.[12] Moreover, as the PBGC points out in its petition (Pet. 25), "Congress itself harmonized the provisions of ERISA with the bankruptcy and labor laws, making it unnecessary—and inappropriate—for PBGC or the court of appeals to balance the spirit of other laws."

2. Like the federal savings and loan insurance program, the pension termination insurance program is in dire financial condition. The PBGC's most recent annual report shows assets of $2.4 billion and liabilities of $4 billion, not including this case. Its deficit has increased dramatically in the last few years, despite increases in the insurance premiums paid by employers. See *Federal Insurance of Private Pension Benefits*, *supra*, at 27; *Promises at Risk*,

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[12] The courts below also erred in concluding (Pet. App. 19a, 109a) that the PBGC did not adequately show that LTV Steel's follow-on plans substantially replace the benefits lost as a result of the termination. It was "not disputed that one of the [Union's] primary goals during the post-termination collective bargaining was the replacement of a large portion of the pension benefits and programs that were lost when the Plans terminated" and that the new plans "substantially achieved that goal." *Id.* at 109a. Moreover, the administrative record showed that the follow-on plans "replace[d] a certain percentage of the difference between the benefit paid by PBGC to retirees and the benefit paid prior to termination[,] * * * provid[ing] up to 100 per cent of the difference and no less tha[n] 90 per cent of the amount not provided by PBGC." R. 224. In this circumstance, there is no reasonable basis for the court of appeals' requirement that the PBGC offer a more "detailed comparison" of the provisions of the old and new plans. Pet. App. 19a. In any event, the discussion of this point by the court of appeals was evidently not a basis for its judgment, since it concluded on other grounds that the character of any follow-on plans could not be considered by the PBGC.

supra, at 19; Pet. 4 n.4. And if restoration is not permitted in this case, the PBGC will be responsible for additional unfunded liabilities of more than $2 billion. Although the PBGC has a claim against LTV under Section 1362, it has in the past recovered only eight percent of employers' unfunded liabilities in bankruptcy proceedings. *Promises at Risk, supra*, at 28. Moreover, because LTV Steel's plans were terminated before the 1987 amendments took effect, the maximum amount the PBGC may recover under Section 1362(b) in this case is 75 percent of the unfunded liabilities.[13] Accordingly, it will lose, at the least, approximately half a billion dollars if the plans are not restored.[14] Thus, the PBGC's deficit will increase by not less than one-third, and may double, as a result of this case.[15]

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[13] In addition to its claim under Section 1362(b), the PBGC has a claim against LTV for due and unpaid minimum funding contributions under 29 U.S.C. 1362(d) (Supp. IV 1986). However, that claim is for less than 25 percent of the total amount of the liabilities LTV is attempting to shift to the PBGC, and any sum that the PBGC collects on that claim will reduce the amount of its claim under Section 1362(b).

[14] Although Section 1362(b) now permits the PBGC to recover in full, in light of its past experience the PBGC cannot reasonably hope to recover anything near 100 percent of an employer's unfunded liabilities except in unusual cases.

[15] LTV suggested in the district court that the PBGC wanted to restore its plans, even though they would have to be reterminated soon, merely to take advantage of the 1987 amendments permitting it to seek 100 percent recovery. The district court found no merit to this contention. Pet. App. 120a-122a. Moreover, the PBGC would run serious risks by restoring a plan that was likely to be reterminated, since in the interim participants would accrue benefits under the restored plans (which could be very substantial in this case if a plant were shut down). And in this case, the PBGC found that, in light of its financial turnaround and the general improvement in the domestic steel industry, LTV Steel could fund the plans, so that retermination is unlikely, at least in the foreseeable future.

In addition, other companies in financial trouble are sure to attempt to follow LTV Steel's lead, and terminate (or force the PBGC to terminate) plans with the understanding that they will provide lost benefits to their employees. Indeed, Wheeling-Pittsburgh Steel, which had terminated pension plans with unfunded liabilities of half a billion dollars, recently sought a declaratory judgment that it could implement follow-on plans, and the bankruptcy court, following the decision here, recommended that it be allowed to do so. *USWA* v. *PBGC*, Bankr. No. 85-793 (W.D. Pa. June 30, 1989). Thus, even in the absence of a conflict in the circuits, review is warranted now in light of the significant effect of this case on the PBGC's deficit and the substantial dislocations that will result if other companies terminate their pension plans in the wake of the decision below.

Finally, the abusive follow-on question is plainly ripe for review since the court of appeals has prohibited the PBGC from considering the issue in determining whether to restore LTV Steel's plans. Were the PBGC to decide on remand that, in the absence of this factor, restoration is not warranted, the PBGC would then presumably be foreclosed from appealing its own decision. As a result, between $500 million and $2 billion would be added to the PBGC's deficit without the opportunity for review by this Court.[16]

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[16] We do not believe that, by themselves, the other issues that the PBGC has presented—(1) whether the courts below

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

OCTOBER 1989

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erred in rejecting the PBGC's conclusion that LTV Steel could afford to fund the restored plans and (2) whether the PBGC failed to follow adequate procedures before restoring the plans—warrant review by this Court. However, we disagree with the conclusions reached by the courts below on both issues, and we agree with the PBGC that the requirements imposed by the courts present it with significant practical problems. See Pet. 20-23, 27-30.

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